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Newport News Shipbuilding & Dry Dock Co. v. EEOC: The Family Unit Protected from Pregnancy Discrimination

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NOTE

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. V. EEOC: THE FAMILY UNIT PROTECTED FROM PREGNANCY DISCRIMINATION

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC,*[1] the United States Supreme Court considered for the first time the issue of sex discrimination against males under Title VII.[2] The Court ruled that an employer's health plan violates Title VII if it provides pregnancy-related benefits to female employees that are more extensive than those provided to the wives of male employees, while providing more extensive coverage to all employees' spouses for all other medical conditions requiring hospitalization.[3] The decision in *Newport News* was based on the Pregnancy Discrimination Act (PDA),[4] an amendment to Title VII, which states that it is discriminatory for employers to treat pregnancy-related conditions less favorably than other medical conditions. According to the Court, the employer's health plan in *Newport News* unlawfully discriminated against male employees because it afforded married male employees less comprehensive insurance than was provided to married female employees. The Court determined that when an employer's insurance program covers employees' dependents, male employees have the same right to pregnancy disability benefits for their spouses that female employees possess.[5] As determined by the *Newport News* Court, Congress' intent in enacting the PDA was to extend the protection of Title VII to all pregnant women who are entitled to health benefits.[6] Title VII, however, expressly applies only to employees and, therefore, would not directly protect an employee's pregnant wife. The Court in *Newport News* specifically found

1. 103 S. Ct. 2622 (1983).

2. Title VII of the Civil Rights Act of 1964 § 703(1), 42 U.S.C. § 2000e-2(a) (1976), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

3. 103 S. Ct. at 2631-32.

4. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1980 & Supp. II 1982), provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under the fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

5. 103 S. Ct. at 2630-31.

6. *Id.* at 2627-32.

that because employees with pregnant spouses were entitled to protection, discrimination against their wives constituted discrimination against the employee-husbands.[7]

In acknowledging that male employees are victims of an employer's pregnancy-based discrimination, the *Newport News* Court rejected the test of discrimination it had previously established in *General Electric Co. v. Gilbert*[8] and widened the scope of Title VII's protection against discrimination. The *Newport News* Court viewed employees and their spouses as inseparable husband/wife units, and expanded the number of persons protected by Title VII from losses due to uncompensated disability. The Court realistically assessed pregnancy as a condition which affects the family pocketbook. Moreover, by viewing an employee and his spouse as joint victims of his employer's discriminatory actions, the Court concluded that Title VII protects the spouse by virtue of her husband's employment relationship. The Court's conclusion significantly expanded Title VII's protection against discrimination.

LEGISLATIVE HISTORY & JUDICIAL CONSTRUCTION OF TITLE VII

Statutory prohibitions against employment discrimination are a relatively recent development. Congress enacted Title VII of the Civil Rights Act[9] in 1964 to ensure equal employment opportunities for all individuals. Title VII prohibits discrimination on the basis of certain classifications, including classification by sex.[10] The statute mandates that private employers consider an individual's personal capabilities, and not group stereotypes, when making personnel decisions. Early Title VII cases dealt primarily with the urgent discrimination problems that were identified by the civil rights movement of the late 1960's and early 1970's.[11] After courts had addressed blatant forms of employment discrimination, they were able to focus on more subtle types of discrimination. Despite the passage of Title VII, female employees continued to be regarded by employers primarily as childbearers and child rearers who inevitably would leave their jobs once they became pregnant.[12] Because

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7. *Id.* at 2632.

8. *See infra* notes 39-52 and accompanying text.

9. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1981 & Supp. 1983).

10. For the pertinent provision of Title VII, see *supra* note 2.

11. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (in the absence of business necessity, an employer's refusal to hire women with pre-school-age children while hiring men with children of the same age violated Title VII); Rosenfeld v. Southern Pac. Co., 444 F.2d. 1219 (9th Cir. 1971) (employment policy that denied opportunities because of presumed physical limitations of women violated Title VII); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (employer's refusal to hire males as flight attendants violated Title VII); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (employer's denial of switchman's position to female applicant violated Title VII).

12. Employment practices such as mandatory maternity leave and termination have caused erratic employment patterns among women. *See Hearings on H.R. 3861 Before the Senate Subcomm. on Labor on the Comm. of Labor (Public Welfare),* 88th Cong., 1st Sess. 142,

courts have perpetuated this myth of women as childbearers and child rearers,[13] pregnancy, a potentially integral part of the female employee's womanhood, was not protected under Title VII until 1978 when the PDA was enacted.

When Congress enacted the PDA, it delegated supervision of Title VII

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145 (1969); Note, *Pregnancy Disability Benefits Denied: Narrowing the Scope of Title VII,* 32 U. MIAMI L. REV. 173, 174 (1977). For a discussion of the relationship between denial of employment-related benefits and the incentive to work, see Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves,* 7 HARV. C.R.-C.L. L. REV. 260, 261 (1972).

In Cleveland v. La Fleur, 414 U.S. 632 (1974), the Supreme Court held that mandatory termination of pregnant public school teachers violated the due process clause of the fourteenth amendment. According to the Court, the mandatory termination provisions amounted to a conclusive, irrebuttable presumption that every pregnant teacher who reaches the end of the second trimester in her pregnancy is physically incapable of performing her duties. The Court declared that the mandatory maternity leaves swept too broadly by presuming a pregnant worker to be incompetent. The Court found that pregnant workers are not presumptively unable to teach, especially when the medical evidence might be to the contrary, and condemned the lack of individual determinations of ability by the teacher's doctor or by the school board's doctor. *Id.* at 644.

Justice Brennan's dissent in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), also acknowledged this generalized presumption that pregnant women are unable to perform their duties satisfactorily. He noted that of all employees, only pregnant women were required to cease work at a pre-determined stage of their disability, regardless of the women's desire and physical ability to work. Furthermore, women were required to remain off the job for a predetermined period after childbirth. *Id.* at 149-50 n.1 (Brennan, J., dissenting) (quoting Newport News Shipbldg. & Dry Dock Co. v. EEOC, 375 F. Supp. 367, 385 (E.D. Va. 1974)).

The Supreme Court, however, has not been reluctant to strike down statutes which employ similar conclusive or irrebuttable presumptions. *See, e.g.,* Jiminez v. Weinberger, 417 U.S. 628 (1974) (statute that presumed illegitimacy of child and therefore barred child from receiving disability benefits violated fifth and fourteenth amendment due process); Stanley v. Illinois, 405 U.S. 645 (1972) (statute which presumed, without a hearing, that an unwed father was unfit for custody of his child was violative of due process clause of fourteenth amendment); Bell v. Burson, 402 U.S. 535 (1971) (statute authorizing suspension of driver's license and vehicle registration of individual involved in accident, without hearing to determine possible fault, violated procedural due process).

13. The perpetuation of this myth is illustrated by the Supreme Court's decisions in Geduldig v. Aiello, 417 U.S. 484 (1974), and General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). In both decisions, the Court refused to recognize that pregnant women should be treated primarily as workers and that pregnancy should be compensated as any other temporary disability is compensated. *See* Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms,* 1975 SUP. CT. REV. 1, 10 (the analogy of pregnancy to other temporary disabilities was rejected because the Supreme Court viewed childbirth not as a short-term medical condition, but as a long-term process ending only when childrearing is completed).

The conception of women primarily as wives and mothers is deeply rooted in the American tradition. *See, e.g.,* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (upholding the Illinois Supreme Court's refusal to allow women to practice law). According to the *Bradwell* Court:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .
>
> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id.; see also H.R. REP. No. 948, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S. CODE

issues[14] to the Equal Employment Opportunity Commission (EEOC) and authorized the EEOC to promulgate guidelines interpreting Title VII provisions.[15] Although the EEOC guidelines do not carry the force of law,[16] early Title VII decisions accorded great deference to the agency's interpretations.[17] In 1972, the EEOC promulgated a guideline for pregnancy-related disabilities.[18] This guideline indicated that employment practices that adversely affect female employees because of their pregnancy-related conditions constituted disparate treatment based on sex. The guideline further indicated that any pregnancy-related disability should be regarded as a temporary disability under health and sick leave plans. With few exceptions,[19] the lower federal courts adhered to this guideline.[20]

CONG. & AD. NEWS 4749, 4751, *and in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 147, 149 (1979) (remarks of Rep. Perkins) ("As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.").

14. 42 U.S.C. § 2000e-5 (1980 & Supp. 1983).

15. *Id.* at § 2000e-12a.

16. *See* S. AGID, FAIR EMPLOYMENT LITIGATION, PROVING AND DEFENDING A TITLE VII CASE 516 (2d ed. 1979). Title VII does not grant the EEOC formal rule-making authority. Therefore, although EEOC guidelines are usually promulgated in accordance with the Administrative Procedure Act, they are not entitled to the presumption of validity given to formal government regulations such as Civil Service Commission regulations. *Id.*

17. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (enforcing agency's administrative interpretation of Title VII is entitled to great deference); Udall v. Tallman, 380 U.S. 1, 16 (1964) (when faced with an issue of statutory construction, the Court shows great deference to interpretations by the agency charged with its administration); Grubbs v. Butz, 514 F.2d 1323 (D.C. Cir. 1975) (agency regulations are usually presumed valid unless inconsistent with the statute under which they were enacted).

18. The EEOC guidelines on pregnancy discrimination, 29 C.F.R. § 1604.10 (1972), provide in pertinent part:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth and related medical conditions is in prima facie violation of Title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Id.

19. *See, e.g.*, Newmon v. Delta Airlines, Inc., 374 F. Supp. 238, 245 (N.D. Ga. 1973) (pregnancy found to be neither a sickness nor a disability, therefore denial of disability benefits for pregnancy did not violate Title VII), *aff'd*, 475 F.2d 768 (5th Cir. 1973).

20. *See* Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974) (disability plan which excluded pregnancy but included "voluntary" disabilities, such as sports injuries, held

Although the 1972 guideline attempted to promote equality for pregnant women in the workplace, the concept of pregnancy as a family matter under employment health plans had not yet evolved. Accordingly, the early Supreme Court cases addressing pregnancy issues failed to recognize pregnancy discrimination as an aspect of sex discrimination.[21] Furthermore, these decisions did not recognize pregnancy as a family matter. In fact, even after the guideline was promulgated, the Supreme Court maintained an archaic attitude toward pregnancy in the workplace.

The 1974 Supreme Court decision in *Geduldig v. Aiello*[22] limited the usefulness of the EEOC guideline and the scope of Title VII. In *Aiello,* the Court upheld a state's temporary disability insurance program which excluded benefits for normal pregnancies. Ignoring Title VII principles, the Court used an equal protection analysis[23] to conclude that a disability program that excluded pregnancy-related coverage had classified pregnant women in a manner substantially related to a legitimate state purpose.[24] Applying a traditional scrutiny test,[25] the Court found that the state interest in maintaining a low-cost benefits system which adequately compensated other disabilities outweighed the interest in providing coverage for the female employees'

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unlawful), *rev'd,* 429 U.S. 125 (1976); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Or. 1974) (school board's refusal to treat pregnancy as a temporary disability under sick-leave policy violated Title VII and fourteenth amendment), *aff'd,* 519 F.2d 961 (9th Cir. 1975), *vacated and remanded,* 429 U.S. 1033 (1977) (remanded for further consideration in light of *Gilbert*); Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974) (disability plan which included all disabilities except pregnancy held unlawful), *aff'd,* 511 F.2d 199 (3d Cir. 1975) *vacated on jurisdictional grounds and remanded with instructions to dismiss appeal,* 424 U.S. 737 (1976); Bravo v. Chicago Bd. of Educ., 345 F. Supp. 155 (N.D. Ill. 1972) (pregnancy must be treated the same as illness for purposes of sick pay and seniority), *rev'd mem.,* 525 F.2d 695 (7th Cir. 1975); Farkas v. South Western City School Dist., 8 Fair Empl. Prac. Cas. (BNA) 288 (S.D. Ohio 1974) (school board violated Title VII by requiring teacher to take unpaid leave of absence for maternity instead of allowing her to use accumulated sick leave); Lillo v. Plymouth Local Bd. of Educ., 8 Fair Empl. Prac. Cas. (BNA) 21 (N.D. Ohio 1973) (denial of sick leave to pregnant teacher violated Title VII); Dessenberg v. American Metal Forming Co., 8 Fair Empl. Prac. Cas. (BNA) 290 (N.D. Ohio 1973) (school board's grant of sick leave for all disabilities except pregnancy violated Title VII); *see also* Goodyear Tire & Rubber Co. v. Rubber Workers Local 260, 8 Fair Empl. Prac. Cas. (BNA) 128 (Ohio Ct. App. 1974) (period of fifty-two weeks leave designated for other disabilities must supersede pregnancy leave period of six weeks where necessary).

21. *See infra* notes 22-67 and accompanying text.

22. 417 U.S. 484 (1974).

23. *Id.* at 494-95.

24. *Id.* at 494-97.

25. The traditional or minimal scrutiny test requires a defendant to show a rational relationship between the challenged enactment and a legitimate state purpose. *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961) (statute exempting women from compulsory jury duty rationally related to the legitimate state interest of protecting women's central role as homemaker); Goessaert v. Cleary, 335 U.S. 464 (1948) (statute forbidding women from being bartenders rationally related to legitimate interest of reducing moral and social problems); Muller v. Oregon, 208 U.S. 412 (1908) (statute limiting women's workday to ten hours rationally related to legitimate state interest of protecting women from overwork).

In *Aiello,* the standard used to test the validity of classification was a matter of controversy

pregnancy-related disabilities.[26] Thus, the Court concluded that excluding disabilities associated with normal pregnancies was permissible.[27]

The *Aiello* Court, in an infamous footnote,[28] rebutted the dissent's

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between the majority and dissenting opinions. The majority used a "traditional rational relationship" test because it determined that pregnancy was not a gender classification. 417 U.S. at 496. The dissent viewed pregnancy as a suspect sex classification and would have applied a strict scrutiny test. The strict scrutiny test would require the state to prove that the regulation served a compelling state interest which could not be achieved by less drastic means. *Id.* at 498, 502-03 (Brennan, J., dissenting). Noting that stricter standards had been applied in the past for gender classifications, the dissent urged adoption of a stricter standard of judicial scrutiny for gender classifications than that generally accorded economic or social welfare programs. *Id.* at 502-03 (Brennan, J., dissenting) (citing Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973)).

26. 417 U.S. at 496.

27. *Id.* at 494.

28. Because it was the basis for the Court's decision in *Aiello,* footnote 20 is presented in its entirety:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed,* 404 U.S. 71 (1971), and *Frontiero v. Richardson,* 411 U.S. 677 (1973), involving discrimination based on gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are merely pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

417 U.S. at 496-97 n.20.

The *Aiello* Court divided potential disability insurance recipients into two groups. Because women were included in both the group that received benefits and the group that did not receive benefits, the Court determined that there was no sex discrimination.

Relying on this footnote, the Court in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), divided the class of women into pregnant women and non-pregnant women. Thus, the Court was able to find that the employer's plan, which excluded pregnancy from an otherwise inclusive plan, discriminated against pregnancy rather than sex. Because pregnancy was not protected by Title VII, the Court found no Title VII violation.

Shortly after the *Gilbert* decision, Congress passed the PDA. The PDA made it clear that discrimination on the basis of pregnancy was discrimination on the basis of sex. Hence, the *Aiello/Gilbert* method of classification was rendered obsolete. Because the classification adopted in footnote 20 was the basis for two decisions which perpetuated pregnancy-based discrimination, and because Congress quickly and explicitly rejected that classification, footnote 20 in *Aiello* may now be regarded as "infamous."

argument[29] in favor of applying the heightened level of scrutiny which is commonly utilized in cases involving gender-based discrimination.[30] Denying that pregnancy was per se a sex-based classification,[31] the Court declared that the California state insurance plan did not discriminate against all women, but only against those who had a certain physical condition—pregnancy. Although the Court acknowledged that only women can become pregnant, it stated that exclusion of coverage for pregnancy was not sex-based discrimination.[32] Accordingly, the Court found that pregnancy was a classification based on disability, not gender, and concluded that the employer had not violated the equal protection clause of the fourteenth amendment.[33] The Court's reasoning threatened to completely remove pregnancy classifications from the scope of sex discrimination.[34]

Since Title VII had its own analytical standards, the *Aiello* Court's equal

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29. 417 U.S. at 497 (Brennan, J., dissenting). The dissent condemned the departure from the higher standard of review previously applied to gender cases. According to Justice Brennan, the majority did not adequately explain the distinction between the gender-based classification in the California plan and the classifications found unconstitutional in Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971). 417 U.S. at 498 (Brennan, J., dissenting). The dissent warned that the Court's decision was a step backward toward "traditional" equal protection analysis, which upheld classifications that discriminted against women solely on the basis of sex. *Id.* at 503 (Brennan, J., dissenting).

The dissent further stated that gender classifications must be considered as suspect classifications, and therefore, should be subject to strict scrutiny. To survive strict scrutiny, a challenged statute must serve an overriding or compelling interest that cannot be served by less drastic means. According to Justice Brennan, the state failed to meet that burden in *Aiello*. The state's justification for excluding pregnancy coverage was that such coverage would be too expensive. *Id.* at 504 (Brennan, J., dissenting). Financial considerations, however, can not be used to justify invidious discrimination between males and females. *Id.* (Brennan, J., dissenting) (citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969)). As Justice Brennan explained, the state must do more than prove that the denial of benefits to the excluded class saves money. In addition, Justice Brennan suggested that the state's financial concerns could have been alleviated through less drastic, non-discriminatory means. *Id.* at 505 (Brennan, J., dissenting). Justice Brennan noted that the increased costs of providing pregnancy benefits could be accommodated easily by changing other variables that affected the viability of the program, such as contribution rate and maximum benefits allowable. *Id.* (Brennan, J., dissenting) (citing Aiello v. Hansen, 359 F. Supp. 792, 798 (N.D. Cal. 1973)).

30. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (federal statute that permitted male Air Force officers to claim wives as dependents for benefits purposes, while prohibiting female officers from claiming husbands as dependents, found, under strict scrutiny, to be a classification based on sex in violation of the due process clause of the fifth amendment); Reed v. Reed, 404 U.S. 71 (1971) (under strict scrutiny, state probate code that arbitrarily gave males preference for appointment as administrators of estates violated the equal protection clause of the fourteenth amendment).

31. 417 U.S. at 496-97 n.20; *see supra* note 18.

32. *Id.*

33. *Id.* at 496-97.

34. The *Aiello* threat ultimately was eliminated by the enactment of the PDA. If, however, the *Aiello* decision still controlled sex discrimination in employment issues, then pregnancy classifications would be completely removed from Title VII protection. Without Title VII protection, the same unsupportable assumptions about women that underlie sex-based discrimination would underlie discrimination based on pregnancy. If an equal protection analysis still

protection analysis had little precedential value in Title VII litigation.[35] Nevertheless, the Court's adamant refusal to recognize pregnancy as a sex-based classification would ordinarily be followed by lower courts, regardless of whether a case was brought under Title VII or the fourteenth amendment. The *Aiello* Court's reasoning, however, created confusion among the lower courts for two reasons. First, it deemed pregnancy not to be sex-related, even though the ability to bear children is the clearest biological distinction between women and men. Second, while the Court removed pregnancy as a line of demarcation between the sexes, it suggested no viable criteria by which to determine the presence or absence of sex discrimination.

The confusion engendered by the *Aiello* decision underscored the need for a more incisive analysis in pregnancy discrimination cases than the analysis used by the Supreme Court. After the *Aiello* decision, six appellate courts heard Title VII cases involving pregnancy discrimination and rejected the Court's reasoning.[36] By applying a Title VII disparate treatment test, these appellate courts avoided the *Aiello* precedent.[37] The circuit courts analogized

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were to be used, discriminatory pregnancy-based classifications would only be eradicated if they were subjected to the same level of scrutiny given other classifications base on sex. *See generally* Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974) (*Aiello* not only threatens the level of constitutional protection extended to sex discrimination, it also encourages classification on the basis of single-sex characteristics in the private employment sector under Title VII of the Civil Rights Act.)

35. The constitutional standard for finding discrimination differs from the various Title VII standards for finding discrimination. For a discussion of the difference between these standards, see *infra* notes 37-38 and accompanying text.

36. *See* Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975) (sick leave benefits), *aff'd in part, vacated in part, and remanded*, 434 U.S. 136 (1977); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975) (sick leave benefits), *vacated and remanded*, 429 U.S. 1033 (1977) (remanded for further consideration in light of *Gilbert*); General Elec. Co. v. Gilbert, 519 F.2d 661 (4th Cir. 1975) (disability plan), *rev'd*, 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089, 1097-100 (5th Cir. 1975) (dictum used as support to reject the equating of Title VII with the fourteenth amendment), *cert. denied*, 426 U.S. 940 (1976); Communication Workers of Am. v. American Tel. and Tel. Co., 513 F.2d 1024 (2d Cir. 1975) (disability plan), *vacated and remanded*, 429 U.S. 1033 (1977) (remanded for further consideration in light of *Gilbert*); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975) (disability plan and sick leave benefits), *vacated on jurisdictional grounds and remanded with instructions to dismiss appeal*, 424 U.S. 737 (1976). General Elec. Co. v. Gilbert, 429 U.S. 125, 133-46, decided in the wake of *Aiello*, repudiated the conclusion of the six courts of appeals that had considered the question.

37. Because the standard to determine whether sex discrimination exists under Title VII differs from the standard under the equal protection clause of the fourteenth amendment, the six courts found that *Aiello* did not control Title VII issues. *See* Note, *Discrimination Under Title VII of the Civil Rights Act of 1964:* General Electric Co. v. Gilbert, 13 WAKE FOREST L. REV. 813, 821 (1977) [hereinafter cited as Note, *Discrimination Under Title VII*]. For a Title VII violation to exist, a classification must be found which is discriminatory on its face (a prima facie or disparate treatment violation), which is a mere pretext designed to effect invidious discrimination (intent required) or which has a discriminatory effect (intent not required). Under an equal protection analysis, a classification must be found which is discriminatory on its face or which is a mere pretext designed to effect invidious discrimination (intent required).

Claims made under the equal protection clause must meet a heavier burden of proof than

a temporary pregnancy-related disability to any other temporary disability. These courts found disparate treatment on the basis of sex if the employer treated a temporary disability due to pregnancy or childbirth less favorably than other temporary disabilities.[38] Consequently, because *Aiello* was decided on equal protection grounds, lower courts were not prevented from finding Title VII violations under the disparate treatment test when employment pregnancy classifications were involved.

General Electric Co. v. Gilbert[39] was ostensibly[40] the first pregnancy discrimination case to be decided by the Supreme Court under Title VII.[41] Nevertheless, the *Gilbert* Court adhered to the *Aiello* analysis and held that a private employer's disability insurance plan which excluded pregnancy benefits was not discriminatory under Title VII. Because the term "sex discrimination" was left undefined by Congress when it enacted Title VII, the Court examined the meaning of "sex discrimination" to determine whether it encompassed pregnancy discrimination.[42] The Court found that it did not include pregnancy discrimination, that there was no Title VII violation, and that there was no need for further Title VII analysis. Accordingly, the *Gilbert* Court based its decision on *Aiello's* equal protection analysis and concluded that the exclusion of pregnancy from disability insurance coverage was based on a physical condition, not on gender.[43] The *Gilbert* Court reiterated the *Aiello* Court's conclusion that the appropriate comparison was between pregnant women and non-pregnant persons. The Court found that General Electric's plan was prima facie neutral[44] because, aside from pregnancy coverage, there was no discrepancy between its coverage for males and females. The Court stated that absent a showing of either gender-based discrimination or gender-based effect, there can be no discrimination on the basis of sex and, therefore, no Title VII violation. Thus, the Court found it unnecessary to analyze the case under Title VII.[45]

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those made under Title VII because the equal protection analysis requires proof of intent while the Title VII analysis does not. Consequently, a classification may meet the standards for violation under Title VII but fall short of the standards required by the fourteenth amendment. *Id.*

38. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 384 (2d ed. 1983).

39. 429 U.S. 125 (1976).

40. The *Gilbert* Court acknowledged that the suit was brought under Title VII rather than the equal protection clause. *Id.* at 136.

41. The plaintiffs alleged that the employer's plan violated Title VII because it excluded only pregnancy disabilities. The trial and appellate courts heard *Gilbert* as a Title VII case. The district court held that the exclusion of pregnancy benefits from the otherwise all-inclusive disability plan violated Title VII. Gilbert v. General Elec. Co., 375 F. Supp. 367 (E.D. Va. 1974). The court of appeals affirmed in Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975). The Fourth Circuit ruled that *Aiello* was not applicable in a Title VII context, but it acknowledged the *Aiello* conclusion, that disparity in treatment between pregnancy-related and other disabilities was not sex discrimination under the equal protection clause of the fourteenth amendment.

42. 429 U.S. at 133.

43. *Id.* at 135.

44. *Id.* at 136.

45. *Id.* at 140.

Consequently, the *Gilbert* Court failed to employ either of the two analyses appropriate in Title VII cases: the disparate treatment or the discriminatory impact analysis. The disparate treatment analysis[46] determines whether an employee was treated differently from other similarly situated employees on the basis of sex. Under this theory, the *Gilbert* Court could have concluded that the General Electric plan treated employees differently on the basis of pregnancy and, therefore, treated them discriminatorily on the basis of sex. The Court avoided this analysis by following *Aiello* and denying that pregnancy discrimination amounted to sex discrimination. Thus, the Court was able to conclude that General Electric's plan was neutral on its face.[47]

The *Gilbert* Court also circumvented the discriminatory impact analysis which determines whether an employment practice or policy, though neutral on its face, is discriminatory in its effect. In its 1971 decision of *Griggs v. Duke Power Co.*,[48] the Court enunciated the following effects test: if the effect of a facially neutral plan is to discriminate against members of a class, it will amount to a violation of Title VII.[49] The *Gilbert* Court mentioned the *Griggs* effects test, but did not truly apply it to the General Electric plan[50] because the Court neglected to examine the disabilities excluded from the plan; these disabilities resulted in a discriminatory effect on females. Rather, the Court focused solely on a comparison of included disabilities.[51]

By failing to apply Title VII principles, the *Gilbert* Court expressly declined

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46. *See supra* notes 37-38 and accompanying text.

47. 429 U.S. at 135.

48. 401 U.S. 424, 431 (1971) (although neutral on its face, employment practice of requiring either a high school diploma or a passing grade on an intelligence test had invidious impact by disqualifying a disproportionate number of blacks).

49. The *Griggs* Court introduced its effects test with the following language:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

401 U.S. at 432 (emphasis in original).

50. 429 U.S. at 137.

51. *Id.* at 137-40. As was later recognized in *Newport News*, it is inappropriate to compare only those disabilities included in a plan to determine whether they are identical for both males and females. 103 S. Ct. 2622, 2630-31 (1983). A comparison of coverages excluded, as well as those included, would have revealed that under General Electric's plan women were disadvantaged by the different coverage they received: they were not covered for pregnancy, the most prevalent of the female work-related disabilities. The plan included no comparable exclusion for men; males were covered for all of their work-related disabilities. Thus, under a proper application of the *Griggs* effects test, sex discrimination would inevitably have been found to exist in General Electric's plan because, although it was not discriminatory on its face, the plan had an adverse impact on females as a class. The *Gilbert* Court instead followed the *Aiello* analysis and examined only the disabilities included in the plan. 429 U.S. at 138-39. Finding that the included disabilities were identical for males and females, the Court concluded that there was no gender discrimination evident in the impact of the benefits plan. *Id.* For

to defer to the EEOC guideline.[52] The *Gilbert* Court's refusal to follow the guideline reflected a departure from the deference courts had traditionally accorded the EEOC when deciding Title VII cases. Hence, by following *Aiello,* the Court ignored the pronouncements of an agency charged with interpreting discrimination issues.

While the *Gilbert* majority turned its back on the agency interpretations of discrimination, the dissenting opinions reflected the views that prevailed in Congress when the PDA was enacted. Justice Brennan disagreed with the Court's conclusion that there was no discrimination under Title VII because all employees could collect on the included risks. According to Justice Brennan, the majority's reasoning disregarded any adverse effect the plan might have on a group with a unique uncovered risk of disability.[53] Justice Brennan noted that although General Electric's plan protected male employees against all risks they might incur,[54] the plan failed to offer female employees protection against all risks they might incur by virtue of their gender. The *Gilbert* majority agreed with General Electric's assertion that prohibitive costs

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a bar graph which illustrates the risk-inclusion and -exclusion concepts, see Comment, *Differential Treatment of Pregnancy in Employment: The Impact of* General Electric Co. v. Gilbert and Nashville Gas Co. v. Satty, 13 HARV. C.R.-C.L. L. REV. 717, 730 (1978).

52. To justify its refusal to defer to the EEOC guideline, the *Gilbert* Court focused on the eight year interval between the enactment of Title VII and the promulgation of the guideline. 429 U.S. at 142. The Court also noted that the guideline was inconsistent with a 1966 opinion letter from the EEOC's General Counsel, stating that because pregnancy is a temporary, female-unique disability, employees' benefits programs that exclude long-term pregnancy disability coverage would not violate Title VII. *Id.* Finally, the Court recognized that the guideline conflicted with the Equality Pay Act, 29 C.F.R. § 800.116(d) (1975), that interpreted the Bennett Amendment to Title VII (110 CONG. REC. 13,647 (1964)). The regulation provided that if employer contributions to an insurance plan are equal for men and women, an accrual of benefits that is greater for one sex than for the other would not violate the Equal Pay Act. 429 U.S. at 144-45.

In determining the deference to be accorded the EEOC guideline, the *Gilbert* Court looked to the standards set forth in Skidmore v. Swift, 323 U.S. 134 (1944). The *Skidmore* decision held that the weight accorded an interpretive ruling such as the EEOC guideline depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 141-42. Since the EEOC guideline did not meet all the *Skidmore* standards, the *Gilbert* Court concluded that it did not deserve judicial deference. 429 U.S. at 142.

53. 429 U.S. at 160 (Brennan, J., dissenting). Justice Brennan criticized the majority for focusing on the scope of risk-inclusion and ignoring the risk-exclusion factor. *Id.* at 153-55 (Brennan, J., dissenting). If the risks excluded from a plan are not examined, it is impossible to discover the plan's discriminatory effect. The exclusion of a disability that is peculiar to women benefits one sex over the other. The result is a plan with unequal coverage.

According to Justice Brennan, the Court's failure to examine the total effect of the disability plan was an unjustified departure from appropriate Title VII analysis. *Id.* at 160 (Brennan, J., dissenting). Title VII was intended to equalize employment opportunity among all individuals. If the general effect of a disability plan is discriminatory, it violates Title VII, regardless of intent. For further discussion of Justice Brennan's dissent, see Note, *Discrimination Under Title VII, supra* note 37, at 824-25.

54. 429 U.S. 125, 152 (Brennan, J., dissenting).

prevented coverage of every possible disability.[55] Justice Brennan observed, however, that there was no indication that General Electric's choice to exclude pregnancy, rather than some other less controversial disability, was founded on a neutral assessment of the risks.[56] The plan demonstrated a sex-conscious process of including insurance for some risks and excluding it for others, rather than a sex-neutral determination of coverage.[57] Therefore, Justice Brennan condemned the plan as one which perpetuated the secondary status of females in the company's labor force.[58]

Justice Brennan also objected to the majority's use of the equal protection standard for determining discrimination in lieu of, or interchangeably with, the Title VII standard.[59] Justice Brennan declared that the Court's implication that the fourteenth amendment analysis must be used instead of Title VII conflicted with cases decided prior to *Gilbert*.[60] Invoking *Washington v. Davis*,[61] he asserted that the constitutional standard for adjudicating claims of invidious discrimination is not identical to the standards applicable in a Title VII case.[62] Stressing that the *Gilbert* majority should have kept the standards distinct and used the Title VII analysis, Justice Brennan prophetically referred to the Court's analysis as "fleeting dictum."[63]

Justice Stevens also disapproved of the constitutional analysis in *Gilbert*. He declared that the constitutional holding of *Aiello* should not control the issue presented in *Gilbert*.[64] According to Justice Stevens, the Court should have framed the issue as one requiring statutory construction: does an employee's benefits program, which treats pregnancy differently than other disabilities, discriminate against certain individuals because of their sex, in violation of Title VII?[65] Because the majority did not utilize a Title VII analysis to examine the facially neutral criteria for a discriminatory effect, pregnancy was found to be nondiscriminatorily excluded from the plan.

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55. Although the majority opinion did not directly state that prohibitive costs prevented coverage of all possible disabilities, it cited statistics demonstrating that inclusion of pregnancy benefits would increase employers' costs by a large, though indeterminable, amount. Thus, the majority indicated that burdensome expense might be a valid justification for the exclusion of pregnancy benefits. *Id.* at 130-31.

56. Justice Brennan indicated that the employer's concern regarding pregnancy and its lack of concern regarding other sex-linked disabilities demonstrated that the implementation of the plan was motivated by a discriminatory attitude toward women. 429 U.S. at 153 (Brennan, J., dissenting) (quoting with approval Gilbert v. General Elec. Co., 375 F. Supp. 367, 383 (E.D. Va. 1974)).

57. 429 U.S. at 153 (Brennan, J., dissenting).

58. *Id.* (Brennan, J., dissenting).

59. *Id.* at 153-54 n.6 (Brennan, J., dissenting).

60. *Id.* (Brennan, J., dissenting).

61. 426 U.S. 229 (1976). For a discussion of *Washington*, see *infra* note 68.

62. 426 U.S. at 238-39.

63. 429 U.S. at 154 n.6 (Brennan, J., dissenting). Justice Brennan foresaw that, because of the Court's confusion of constitutional and statutory standards, *Gilbert* would have only limited precedential value.

64. *Id.* at 160-61 (Stevens, J., dissenting).

65. *Id.* at 161 (Stevens, J., dissenting).

According to Justice Stevens, this impermissibly placed pregnancy in a class by itself.[66] He concluded that because it is the female's ability to bear offspring which primarily distinguishes her from the male, the exclusion necessarily discriminated on the basis of sex and should have been found to be violative of Title VII.[67]

The *Aiello* and *Gilbert* analyses confused the Title VII standards of discrimination with the fourteenth amendment standards.[68] The weak analysis[69] in *Gilbert* prompted Congress to enact the PDA in 1978.[70] The PDA provides that Title VII protections apply to pregnancy-related conditions, and that women should be treated the same as any other disabled person with the same ability or inability to work.[71] Although the PDA was intended specifically to address the problem presented by the *Gilbert* decision,[72] Congress left the issue of spousal pregnancy coverage, tentatively

66. *Id.* at 161-62 (Stevens, J., dissenting).

67. *Id.* at 162 (Stevens, J., dissenting).

68. Interestingly, just six months prior to its decision in *Gilbert*, the Court in Washington v. Davis, 426 U.S. 229 (1976), reaffirmed that equal protection and Title VII standards are not identical and are not to be confused in application. In *Washington*, black plaintiffs, who were rejected as prospective police officers because of low scores on a verbal skills test, were denied relief under the equal protection standard. The Court found that the required tests were not intended to discriminate against blacks, but instead were intended to upgrade employee competence. The Court held that without a discriminatory intent, the test's disproportionately negative impact on blacks did not violate the fourteenth amendment. According to the *Washington* Court, the Court of Appeals for the D.C. Circuit erroneously applied Title VII standards in a case which should have been decided on constitutional grounds. To find a violation under the constitutional standard, a discriminatory purpose, as well as a discriminatory impact, must be proven. In *Washington*, it was determined that since no discriminatory intent was proven, there was no equal protection violation, and application of the statutory Title VII standard should not be extended to the field of public employment without legislative action. 426 U.S. at 238-48.

69. For discussions of *Aiello* and *Gilbert* which conclude that the decisions were anomalous at best, see Larson, *Sex Discrimination as to Maternity Benefits,* 1975 DUKE L.J. 805; Comment, *Differential Treatment of Pregnancy in Employment: The Impact of* General Electric Co. v. Gilbert *and* Nashville Gas Co. v. Satty, 13 HARV. C.R.-C.L. L. REV. 717 (1978); Note, *Employment Discrimination—Corporate Paternity Responsibility: Reverse Discrimination Under the Pregnancy Discrimination Act* - Equal Employment Opportunity Commission v. Lockheed Missles [sic] *and* Space Co., 680 F.2d 1243 (9th Cir. 1982), 1982 ARIZ. ST. L.J. 1031 [hereinafter cited as Note, *Employment Discrimination*]; Note, *Income Protection for Pregnant Workers,* 26 DRAKE L. REV. 389 (1977); Note, *Pregnancy Disability Benefits,* 91 HARV. L. REV. 241 (1977); Note, *Pregnancy Disability Benefits Denied: Narrowing the Scope of Title VII,* 32 U. MIAMI L. REV. 173 (1977); Recent Decision, *Exclusion of Pregnancy-Related Disabilities from Benefit Eligibility Under Employer Disability Plan Does Not Constitute Sex Discrimination Violative of Title VII of 1964 Civil Rights Act,* General Electric Co. v. Gilbert, 6 U. BALT. L. REV. 313 (1977).

70. Congressional objection to *Gilbert* was so strong that bills were introduced in both the House and the Senate to amend Title VII to include specifically pregnancy-based discrimination in its sex discrimination proscriptions. H.R. 6075, 95th Cong., 1st Sess., 123 CONG. REC. H3093 (daily ed. Apr. 4, 1977) (replacing H.R. 5055, 95th Cong. 1st Sess., 123 CONG. REC. 7540 (1977)); S. 995, 95th Cong., 1st Sess., 123 CONG. REC. 7540 (1977). The Senate bill was passed in September 1977. S. 995, 95th Cong., 1st Sess., 123 CONG. REC. 29,664-65 (1977).

71. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1980 & Supp. II 1982). For the text of the PDA, see *supra* note 4.

72. Senator Bayh, one of the original sponsors of S. 995, which became the PDA, stated

raised during the debates,[73] to be resolved by litigation.[74] The Supreme Court first interpreted the PDA in *Newport News Shipbuilding & Dry Dock Co. v. EEOC.*[75]

THE *NEWPORT NEWS* DECISION

Newport News represented the Supreme Court's initial recognition of pregnancy as a family-related matter in the employment benefits context. The Court sought to protect those economically involved in a pregnancy—both the husband and his wife. While the PDA expressly protects women from pregnancy-related employment discrimination, the *Newport News* Court extended PDA protection to the entire family unit by mandating that employers recognize the male employee's economic responsibility to his unborn child. Under this new family unit concept, a male employee must be compensated for his wife's pregnancy when full coverage is provided for female employees.

Facts and Procedural History

The Newport News Shipbuilding and Dry Dock Company's disability plan initially provided ostensibly identical coverage for its male and female employees. The two groups did not, however, receive equal coverage because the plan provided full coverage only for those risks common to both males and females. For example, while male employees were subject to no sex-

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that the legislation was necessitated by the "unfortunate decision" in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). 123 CONG. REC. 29,641 (1977); *see also id.* at 29,664 (statement by Sen. Brooke that Congress must act immediately to correct the "inequity and disastrous consequences of *Gilbert*"); *id.* at 29,663 (statement by Sen. Culver that *Gilbert* must be reversed to "help women and their families who will be forced to suffer severe economic and social consequences"); *id.* at 29,661 (statement by Sen. Cranston that bill was introduced in response to the "disappointing" decision in *Gilbert*); *id.* at 29,660 (statement by Sen. Biden that the Supreme Court made it clear that the only way that pregnancy discrimination will not continue is for Congress to make such discrimination clearly illegal); *id.* at 29,657 (statement by Sen. Williams that the legislation deals with discrimination that the Supreme Court would permit under the Civil Rights Act); *id.* at 26,650 (statement by Sen. Hatch that purpose of the bill is to reverse *Gilbert*).

73. The issue of pregnancy coverage for employees' dependents was raised during the Congressional debates on the PDA. 123 CONG. REC. 29,642, 29,643-44, 29,663 (1977). It must be emphasized, however, that the legislative history focused on effectively reversing *Gilbert,* so that working women would no longer suffer sex discrimination because of pregnancy-related disabilities. For a discussion of Congress' intent regarding the applicability of the PDA to spousal coverage, see *infra* notes 131-45 and accompanying text.

74. [T]he basic purpose of this bill is to protect women employees, it does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing Title VII principles.

S. REP. NO. 331, 95th Cong., 1st Sess. 6 n.16 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 38, 43 (1979).

75. 103 S. Ct. 2622 (1983).

specific coverage exclusions, the plan excluded hospitalization coverage for pregnancy.[76] After the PDA was enacted, the company amended its insurance plan to allow equal hospitalization and surgical coverage for male and female employees for all medical disabilities, including pregnancy. The plan, however, limited coverage of spouses' pregnancies to $500 of the hospitalization costs for an uncomplicated delivery.[77] As a result, if a normal delivery cost more than $500, a male employee would not receive full reimbursement and, therefore, would receive less employment compensation for his wife's disability than a female employee would receive for her husband's disabilities.[78]

The amended insurance plan contravened new EEOC guidelines that were issued before the amended plan became effective. Guideline 21 states that in situations where the employer has provided coverage for dependents, the medical expenses of the spouses of both male and female employees must be covered equally;[79] the guideline expressly declares that this includes pregnancy-related conditions. Guideline 22 reaffirms guideline 21 by stating that an employer need not provide spousal medical coverage, but if any spousal coverage is provided, then female spouses are entitled to pregnancy-related benefits at the same level of coverage afforded to male spouses for

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76. *Id.* at 2624-25.

77. *Id.* at 2625.

78. *Id.* (citing with approval Newport News Shipbldg. & Dry Dock Co. v. EEOC, 667 F.2d 448, 449 (4th Cir. 1982)).

79. The Final Interpretive Guidelines, 44 Fed. Reg. 3804-08 (1979), were set forth in the form of questions:

> 21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouse of male employees? Of the dependents of all employees?
>
> A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.
>
> 22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?
>
> A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical condition of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

Id.

their medical disabilities.[80] These guidelines make it evident that, under the EEOC's interpretation, the Newport News plan would violate Title VII.

On September 20, 1979, John McNulty, a male employee of Newport News, together with the United Steelworkers of America, American Federation of Labor-Congress of Industrial Organizations-Central Labor Council (AFL-CIO-CLC), filed charges with the EEOC alleging that Newport News had unlawfully refused to provide full insurance coverage for his wife's hospitalization during her pregnancy.[81] Essentially, the charges sought enforcement of EEOC guidelines 21 and 22. Newport News sought a permanent injunction barring enforcement of the EEOC guidelines and a declaratory judgment regarding the legality of its disability insurance plan.[82] Subsequently, the EEOC filed a civil action against Newport News, alleging discrimination of the basis of sex against male employees in its provision of pregnancy hospitalization benefits.[83]

The United States District Court for the Eastern District of Virginia found that the EEOC guidelines, while entitled to consideration in determining legislative intent, did not have the force of law.[84] The court refused to enforce the guidelines on the grounds that: (1) they directly contradicted the *Gilbert* definition of sex discrimination; (2) they were contrary to the express congressional intent regarding the PDA; and (3) the EEOC had previously contradicted itself in interpreting Title VII provisions.[85] Consequently, Newport News's request for injunctive relief was granted. The court also granted declaratory relief to Newport News, reasoning that the employer's insurance plan was lawful because the PDA altered the *Gilbert* decision only to the extent that it required pregnancy-related disablility coverage for pregnant employees and applicants for employment, but not for employees' spouses.[86] Despite acknowledging that the issue of pregnancy benefits for dependents had arisen in floor debates, the court stressed that Congress left that issue to be decided in accordance with existing Title VII principles,[87] which had not been explicitly extended to spousal pregnancy-related disabilities by either Congress or the courts. Consequently, the court found that the Newport News plan neither constituted gender-based discrimination nor resulted in the discriminatory effect required for a Title VII violation[88] because the case did not involve a female employee's pregnancy. Thus, the court declared

80. *Id.*

81. Newport News Shipbldg. & Dry Dock Co. v. EEOC, 510 F. Supp. 66, 67 (E.D. Va. 1981).

82. *Id.*

83. *See* Newport News Shipbldg. & Dry Dock Co. v. EEOC, 667 F.2d 448, 450 (4th Cir. 1982).

84. 510 F. Supp. at 70.

85. *Id.*

86. *Id.*

87. *Id.* (citing S. REP. No. 331, 95th Cong., 1st Sess. 6 (1977); Floor Debate on S. 995, 123 CONG. REC. 29,640-65 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 38, 43 (1979)).

88. 510 F. Supp. at 71.

that McNulty and his wife were not entitled to additional benefits under the Act and, accordingly, dismissed the EEOC's complaint.[89]

On appeal, the United States Court of Appeals for the Fourth Circuit heralded recognition of the family unit in the pregnancy benefits area.[90] A divided panel of the Fourth Circuit reversed the district court, holding that if spousal coverage is provided, an employer's insurance program must cover equally the medical expenses of the spouses of both male and female employees, including pregnancy-related expenses.[91] Describing the Newport News and district court interpretations of the PDA as "tortured,"[92] the court held that the PDA did not limit the provision of disability benefits to female employees and applicants for employment, but included female spouses as well. The court observed that an employer extends medical benefits to spouses to serve an employment-related purpose.[93] Because including spouses serves an employment-related purpose, the spouse so included implicitly must be protected by Title VII. Further, according to the Fourth Circuit, the statute did not preclude benefits payable to an employee for the disability of a spouse.[94] Finally, the court reasoned that the spouse's "ability or inability to work" does not require that the spouse be an employee of the company providing the benefits.[95]

The district court had concluded that the PDA did not resolve the question of dependents' benefits, and therefore, pre-PDA principles were invoked to decide the issue.[96] In contrast, the Fourth Circuit determined that even if the Senate Committee did not specifically address the issue, the question need not be decided by application of pre-PDA principles.[97] The court stated that although Congress left the specific issue to be resolved through litigation, such a judicial determination must be based on the statute as it existed at the time the case arose.[98] Accordingly, the court declared that the PDA was an integral part of Title VII at the time the discrimination in *Newport News* occurred and, consequently, could not be ignored in deciding the case.[99]

By applying the PDA in *Newport News,* the appellate court protected the male employee from reverse discrimination and acknowledged a male employee's financial obligation to his wife's pregnancy. The Fourth Circuit's recognition of the mutual responsibilities of the employee and his wife in their pregnancy provided the basis for the family unit concept subsequently adopted by the Supreme Court.

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89. *Id.*

90. Newport News Shipbldg. & Dry Dock Co. v. EEOC, 667 F.2d 448 (4th Cir. 1982).

91. *Id.* at 450-51.

92. *Id.* at 450.

93. *Id.*

94. *Id.*

95. *Id.* at 450-51.

96. According to the district court, the pre-PDA standards were the "existing Title VII principles" developed in *Aiello* and *Gilbert.* 510 F. Supp. at 71.

97. 667 F.2d at 451.

98. *Id.*

99. *Id.*

The Supreme Court Decision

The United States Supreme Court held that the Newport News disability plan violated the PDA because it did not provide male employees' wives with the same pregnancy-related benefits as were enjoyed by female employees.[100] In considering whether the exclusion of pregnancy-related coverage for spouses of male employees constituted discrimination on the basis of sex, the Court initially observed that it was necessary to examine how "discriminate" is defined in the Title VII context.[101] The Court noted that the sex discrimination protection of Title VII traditionally had been for the benefit of women. Therefore, in order to determine whether the Newport News plan discriminated on the basis of sex against male employees, the Court had to look beyond the bare language of the statute[102] to congressional intent, both express and implied, and scrutinize the post-PDA viability of the *Gilbert* test of discrimination.

Observing that the *Gilbert* decision provided the major impetus for the enactment of the PDA,[103] the *Newport News* Court acknowledged that the *Aiello* test was developed to construe the fourteenth amendment's equal protection clause.[104] Consequently, the Court concluded that the *Gilbert* Court had used the wrong test of discrimination and had decided incorrectly that no Title VII violation existed.[105] The *Newport News* Court discussed with approval the reasoning of the dissenting Justices in *Gilbert*.[106] The Court cited the dissenting opinions to emphasize the erroneous analysis in *Gilbert*.[107] The *Newport News* Court relied on Justice Brennan's risk inclusion/exclusion comparison to explain why the General Electric plan was discriminatory. This comparison highlighted how the *Gilbert* majority had used an inappropriate test to avoid finding prima facie discrimination and discriminatory impact.[108] Justice Stevens had maintained in *Gilbert* that the Court avoided the appropriate test by pitting two inappropriate classes against each other.[109] Hence, to indicate that the *Gilbert* Court made improper comparisons in a Title VII case, the *Newport News* Court quoted Justice Stevens: "It is not accurate to describe the program as dividing potential recipients into two groups, pregnant women and non-pregnant persons. . . . [T]he appropriate classification was 'between persons who face a risk of pregnancy and those who do not.'"[110]

Finally, the Court referred to the dissents' conclusions in *Gilbert*. Under

100. Newport News Shipbldg. & Dry Dock Co. v. EEOC, 103 S. Ct. 2622, 2632 (1983).
101. *Id.* at 2626-27. "Discriminate" had not been defined in the PDA or in Title VII.
102. *Id.* at 2627.
103. *Id.* at 2627-28.
104. *Id.* at 2627.
105. *Id.* at 2628.
106. *Id.* at 2627-28.
107. *Id.*
108. *Id.*
109. 429 U.S. 125, 161 n.5 (Stevens, J., dissenting).
110. 103 S. Ct. at 2628.

General Electric's plan, men were compensated for all types of risks, including those which were male-oriented, while women received only partial protection. The dissenting Justices in *Gilbert* contended that this amounted to discrimination on the basis of sex because "conditions of employment for females were less favorable than for similarly situated males."[111] In emphasizing the analyses of the *Gilbert* dissents, the *Newport News* Court showed that the situation before it was the mirror-image of *Gilbert*.[112]

As additional support for its decision, the *Newport News* Court cited the House Report[113] which stated: "It is the committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act."[114] Because those dissenters objected to both the *Gilbert* majority's analysis as well as its result, and the Committee expressly approved of the dissenting Justices' views during debate on the PDA, the *Newport News* Court concluded that the PDA overturned both the holding and the reasoning of *Gilbert*.[115] The Court stated that this repudiation of *Gilbert* signaled a return to the principles of Title VII as they had been legislatively intended and judicially construed prior to *Gilbert*.[116] The Court emphasized that the PDA had been enacted to guarantee that *Gilbert*'s erroneous construction would not reoccur.[117]

Accordingly, the Court summarily dismissed Newport News's argument that Congress was concerned with the needs of female employees, rather than with those of male employees' spouses. In its analysis, the Court initially observed that statutes apply to problems other than those for which they originally were enacted.[118] The Court further reasoned that because disability insurance programs usually do not present the problem found in the Newport News plan, Congress apparently did not believe that the matter warranted

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111. *Id.*

112. *Id.* at 2632.

113. H.R. REP. No. 948, 95th Cong., 2d Sess. 2 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 4749, 4750, *and in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 147, 148 (1979).

114. 103 S. Ct. at 2628.

115. The dissent, however, objected to this point. The dissent maintained that the PDA overturned *Gilbert* only on its specific, narrow holding that disability plans that are otherwise all-inclusive may exclude pregnancy-related risks. 103 S. Ct. at 2635 (Rehnquist, J., dissenting). According to Justice Rehnquist, it was not Congress' intent to extend PDA protections to male employees with pregnant wives. *Id.* (Rehnquist, J., dissenting). The *Newport News* majority, therefore, incorrectly interpreted Congress' modification of the *Gilbert* result to mean that *Gilbert* was entirely obsolete. *Id.* at 2636 (Rehnquist, J., dissenting). Justice Rehnquist stated that the *Gilbert* analysis was still viable to the extent that it permitted exclusion of pregnancy benefits to any group except female employees. *Id.* (Rehnquist, J., dissenting). For a discussion of Congress' intent regarding the scope of the PDA, see *infra* notes 131-45 and accompanying text. For a full discussion of Justice Rehnquist's dissenting opinion, see *infra* note 141.

116. 103 S. Ct. at 2628.

117. *Id.* The Court noted the comments of various legislators who believed the PDA was not a substantive addition to Title VII, but merely confirmed the prior meaning of Title VII. *Id.* at 2628-29 & n.17.

118. *Id.* at 2629-30.

discussion.[119] Proponents of the PDA emphasized that the legislative intent behind Title VII had always been to protect all individuals from sex discrimination in employment.[120] According to the Court, this protection included, but was not limited to, pregnant female workers.[121]

The *Newport News* Court then introduced its family unit analysis. The Court discerned that a male employee's spouse, although not directly involved in an employment relationship with her husband's employer, was financially affected by her husband's benefits plan. If the husband was denied compensation for his wife's pregnancy-related medical expenses, then he was a victim of sex discrimination. By adopting this analysis, the Court widened the scope of Title VII protection to include an employee on the basis of a non-employee's disability.

The Court then focused on the Newport News disability plan. To demonstrate the invidiousness of the employer's actions, the Court discussed the plan's discrepancies in less controversial terms by analogizing coverage for the risk of pregnancy to coverage for broken bones.[122] The Court stated that providing coverage for the broken bones of female employees' spouses, but not for male employees' spouses, would violate Title VII by discriminating against male employees. Comparing the broken bone analogy to pregnancy-related coverage for spouses of male and female employees, the Court implied that it could no longer use a simple point-by-point comparison of risks that all spouses have in common, since some disabilities afflict only women while others afflict only men. The Court indicated that it was inappropriate to compare the coverage of dependent spouses in order to determine whether male and female spouses received *identical* coverage. Rather, the appropriate comparison was between the entire benefits package provided to a female employee and her spouse, and the entire package provided to a male employee and his spouse to determine whether there was *equality* of coverage.[123] The Court concluded that the unfairness of the Newport News plan was demonstrated by the fact that it provided less than full coverage for female-unique conditions (i.e., pregnancy) in the male employee package, but provided full coverage for male-unique treatment (e.g., vasectomies, prostatectomies) in the female employee package.[124]

Building on this analysis, the Court articulated a bifurcated analysis to ensure that the safeguards of Title VII and the PDA are extended to pregnant spouses. First, the Court stated that the PDA makes clear that discrimina-

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119. *Id.*

120. *Id.* at 2630.

121. *Id.* The Court cited with approval the remarks of Sen. Williams: "[T]he Court has ignored the congressional intent in enacting Title VII of the Civil Rights Act - that intent was to protect all individuals from unjust employment discrimination, including pregnant workers." 123 CONG. REC. 29,385-652 (1977) (remarks of Sen. Williams).

122. 103 S. Ct. at 2631.

123. *Id.*

124. *Id.*

tion based on pregnancy is prima facie sex-based discrimination.[125] The Court preferred the "but for" test set forth in *City of Los Angeles Department of Water & Power v. Manhart:*[126] Discrimination is treatment which "but for that person's sex would be different."[127] Thus, the Court essentially rejected the test for discrimination adopted in *Aiello* and *Gilbert*.

The second part of the *Newport News* analysis is the heart of the family unit concept. The Court stated that discrimination against an employee's pregnant spouse in the provision of fringe benefits necessarily amounts to discrimination against the employee himself, because a pregnant woman's spouse is always a male.[128] In this part of its analysis, the Court implicitly recognized that disability discrimination toward spouses has a financial impact on the family, causing a loss not only to the spouse but also to the employee.[129] This husband/wife or family unit analysis[130] introduced a new concept in sex discrimination and widened the spectrum of individuals entitled to protection under Title VII.

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125. *Id.*

126. 435 U.S. 702 (1978).

127. *Id.* at 711 (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)). The Los Angeles Water and Power Department's pension plan required that females make larger contributions to the fund than males. This requirement was based on mortality tables and the department's own experience, which indicated that women had greater longevity than men. The cost of pension payments, therefore, was greater for the average woman because she would receive more monthly payments after retirement than the average man.

The Supreme Court held that the contribution differential violated Title VII. 435 U.S. at 707-18. The Court reasoned that the differential was discriminatory because of its "treatment of a person in a manner which but for that person's sex would be different." *Id.* at 711. According to the Court, Title VII protects individuals, not classes, and thus prohibits treating persons merely as components of a class. *Id.* at 709. Even if women generally do outlive men, it is wrong to use that generalization in the case of an individual woman to whom it may not apply. *Id.* at 710.

In 1983, the Supreme Court reaffirmed the *Manhart* decision in Arizona Governing Comm. v. Norris, 103 S. Ct. 3492 (1983). In *Norris*, the employer offered its workers the option of receiving pension benefits from one of several insurance companies, all of which paid women lower monthly benefits than men. The Supreme Court held, in a per curiam opinion, that the classification of employees on the basis of sex is no more permissible at the receiving stage of a retirement plan than at the contribution stage, and therefore, the plan violated Title VII. *Id.* at 3497.

The Court in *Norris* applied the *Manhart* "but for" test. If a woman wished to receive monthly benefits equal to those obtained by a man, the Court noted that she would have to make greater monthly contributions than a man, just as the female employees in *Manhart* were required to make greater contributions to obtain equal benefits. *Id.* Both the *Norris* and *Manhart* plans were discriminatory because they treated women as components of a class, rather than as individuals. In applying the class generalization of greater longevity for women, the employer treated each woman in a manner which, but for her sex, would have been different. *Id.*

128. 103 S. Ct. at 2631.

129. *See infra* notes 147-51 and accompanying text.

130. *See infra* notes 150-53 and accompanying text.

ANALYSIS AND IMPACT OF THE *NEWPORT NEWS* DECISION

As a starting point for its analysis, the *Newport News* Court examined the legislative intent underlying the PDA. The Court concluded that Congress' purpose in enacting the PDA was to protect pregnant women from an employer's unlawful employment practices. Accordingly, the Court extended PDA protection to male employees for their wives' pregnancies. The congressional debates, however, are vague with respect to Congress' position on the scope of the Act's protection in a situation like that presented in *Newport News*.[131] Although several opinions were voiced on both sides of the issue, the predominant position was that the PDA protected only working female employees, and not the spouses of male employees.[132] The Court, therefore, played an activist role by extending Title VII safeguards to pregnant non-employees.

The *Newport News* majority virtually ignored the comments of various members of Congress who opposed extension of Title VII protection to pregnant spouses. The best example of such a comment is an exchange which occurred between Senators Williams and Hatch.[133] Senator Hatch questioned Senator Williams, a proponent of the bill, about exactly which pregnant

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131. 123 CONG. REC. 29,640-44 (1977).

132. The following comments indicate that members of Congress concentrated on the needs of the nation's working women during its discussions of the PDA: "[The PDA] will end a major source of discrimination unjustly afflicting working women in America." 124 CONG. REC. 36,819 (1978) (remarks of Sen. Stafford); "[The bill] is necessary in order for women employees to enjoy equal treatment in fringe benefit programs." *id.* at 21,439 (1978) (remarks of Rep. Quie); "[The bill] will provide rights working women should have had years ago." *id.* at 21,437 (1978) (remarks of Rep. Green); "[T]he bill simply requires that pregnant workers be fairly and equally treated." 124 CONG. REC. H6867 (daily ed. July 18, 1978) (remarks of Rep. Akaka).

Remarks indicating that the PDA intended spousal coverage for pregnancy are discussed *infra* at notes 136-40 and accompanying text.

133. The Hatch-Williams exchange is quoted in pertinent part:

> Mr. HATCH: [T]he phrase "women affected by pregnancy, child birth or related medical conditions," . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.
>
> Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. One might even argue that other female dependents are covered. . . .
>
> Mr. WILLIAMS: [I] do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee. . . . It deals with a woman, a woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.
>
> Mr. HATCH: [T]his act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?
>
> Mr. WILLIAMS: Exactly.

123 CONG. REC. 29,643-44 (1977).

women would be protected by the PDA. Senator Williams declared that the statute would apply only to a pregnant woman who is an employee and who becomes pregnant after the commencement of her employment.[134]

This exchange between Senators Williams and Hatch was the most explicit indication that Congress did not intend that the PDA apply to the pregnancy of an employee's dependent. In addition, numerous statements in the legislative history also implicitly indicated that the PDA was intended to protect only pregnant working women.[135] While none of these comments were made directly in response to questions about spousal coverage, they consistently focused only on the rights and needs of working women.

Senators Bayh and Cranston made the only two comments which could be construed to support the extension of PDA protection to spouses. Yet, because of their tentative nature and context, these comments are poor indicia of congressional intent. Senator Bayh's comment, made while discussing the potential impact of the PDA, addressed the issue of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage.[136] Like the *Newport News* Court, Senator Bayh answered in the affirmative.[137] He made it clear, however, that the issue was one to be decided by the courts and implied that such an issue should be decided under the fourteenth amendment and Title VII principles which existed prior to *Gilbert*. Senator Bayh's comment indicates his reluctance to present a firm congressional position on the issue and furthermore is not as forceful as the Hatch-Williams exchange.

Senator Cranston's comment is substantively more persuasive because it set forth the primary policy consideration implicit in the *Newport News* decision. The Senate Committee on Labor and Human Resourses did not expressly consider the issue of pregnancy coverage for dependents, the Senator explained, because it presumed that dependents were covered under most medical plans, and that if husbands of female employees were covered, it was unlikely that wives of male employees would not be covered.[138] Senator

134. *Id.* at 29,644.

135. *See supra* note 132.

136. Senator Bayh stated that the legislation would not require employers to provide the same coverage for male employees' dependents as it provides to female employees. He noted, however, that the legislation did not resolve the issue of whether dependents of male employees must receive complete maternity coverage if the spouses of female employees are provided full medical coverage. According to Senator Bayh, although it would be difficult to anticipate how the courts would rule on the issue, the history of sex discrimination under the fourteenth amendment and previous interpretations of Title VII regulations regarding the treatment of dependents would require companies that provide full coverage to the dependents of female employees to also provide complete coverage to the dependents of male employees. 123 CONG. REC. 29,642 (1977) (remarks of Sen. Bayh).

137. *Id.*

138. Senator Cranston stated that the Human Resources Committee, which considered how the legislation would affect the medical coverage for employees' dependents, raised the question of whether an employer would be obligated to cover the pregnancy-related medical expenses of employees' spouses. The committee, however, did not reach a conclusion on the

Cranston took for granted, and implied that the Committee did also, that the typical medical plan covering dependent disabilities would do so equally and equitably.[139] He declared that a plan that did not cover male and female spouses in such an equitable manner would be violative of Title VII and would have "such antifamily ramifications . . . totally inimical to the values we hold so dear and which we, in these times, are attempting to strengthen."[140] Senator Cranston, however, made clear that this last statement was his personal view. Furthermore, the comment does not outweigh the explicitness of the Hatch-Williams exchange.

Thus, although the *Newport News* Court arrived at a result consistent with the spirit of Title VII, the Court, contrary to its assertions, did not rely on the legislative history of the PDA. This departure from the legislative history left the majority opinion vulnerable to attack by Justice Rehnquist's dissent. His objections were based completely on the PDA's legislative history,[141] and his dissent focused on the Hatch-Williams exchange to show

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issue because it presumed that most comprehensive medical plans do cover dependents, and that it would be unlikely that any such comprehensive plan would cover husbands of female employees but not wives of male employees. The committee did not directly decide whether providing coverage for female employees' spouses would violate Title VII. *Id.* at 29,663 (1977) (remarks of Sen. Cranston).

139. *Id.*

140. *Id.*

141. The dissenting opinion, written by Justice Rehnquist and joined in by Justice Powell, maintained that the "individual" that the PDA protected under Title VII was only the employee or applicant for employment. 103 S. Ct. at 2633 (Rehnquist, J., dissenting). The language, "[b]ecause of such individual's pregnancy," could be construed, therefore, only as referring to the pregnancy of an employee. The dissent asserted that the language, "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work," meant only female employees. The dissent did not explain, however, why Congress did not use the terms "pregnant employees" instead of "women," or "other employees" instead of "other persons." *Id.* at 2633 n.3 (Rehnquist, J., dissenting). The dissent supported its position by citing the two other circuit court decisions on the spousal pregnancy disability issue, in which the courts reached the opposite conclusions of the *Newport News* Court. *Id.* (Rehnquist, J., dissenting); *see* EEOC v. Joslyn Mfg. and Supply Co., 706 F.2d 1469 (7th Cir. 1983) (court not bound by the EEOC's interpretation of the PDA; Title VII does not require an employer to provide male employees with the same medical benefits for their spouses' pregnancies as it provides for female employees' pregnancies); EEOC v. Lockheed Missiles & Space Co., 680 F.2d 1243 (9th Cir. 1982) (PDA did not change the basic Title VII principles as they existed prior to the enactment of the PDA, and therefore exclusion of pregnancy-related coverage from disability plan was not gender-based discrimination in violation of Title VII). For a discussion of *Lockheed*, see Note, *Employment Discrimination, supra* note 69, at 1037-40 (*Lockheed* holding failed because Congress intended to make all forms of pregnancy-based discrimination unlawful and to overrule *Gilbert* through enactment of the PDA); *see also* EEOC v. Emerson Elec. Co., 539 F. Supp. 153 (E.D. Mo. 1982) (PDA is inapplicable to disability coverage for employees' dependents, and therefore, a plan that limits coverage of pregnancy-related expenses for spouses while completely covering other medical expenses of spouses, is not sexually discriminatory).

The dissent disagreed with the majority's declaration that the scope of the PDA need not be confined to the specific problems that motivated its enactment. 103 S. Ct. at 2635 (Rehnquist,

that the PDA was intended to apply only to pregnant workers.[142] The majority cited certain members of Congress, who agreed with the dissenters in *Gilbert*. Justice Rehnquist, however, emphasized that the entire Congress did not agree with the *Gilbert* dissents.[143] Furthermore, since the dissent in *Gilbert* had not discussed a *Newport News* type situation, one could not assume that the members of Congress who agreed with the *Gilbert* dissenters would necessarily agree with the *Newport News* majority.

The *Newport News* Court could have based its decision on factors that were more persuasive than legislative history. One such factor was the statutory language of the PDA, which provided that "persons" rather than "employees" are to be covered for pregnancy disability.[144] The actual words of a statute carry greater weight than any judicial construction of those words.[145] The dissent's constructing the word "persons" to mean "employees" would have narrowed the scope of the statute in contradiction to its literal content.

Since the EEOC guidelines expressly require the result reached in *Newport News,* the guidelines are yet another factor on which the Court could have based its decision. The *Newport News* Court announced that the PDA had entirely overruled the *Gilbert* opinion, in which the Court had refused to follow previous EEOC guidelines. The overruling of *Gilbert* heralded a return to pre-*Aiello/Gilbert* Title VII principles and, consequently, restored to the

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J., dissenting). Justice Rehnquist stated that the majority's interpretation might have been viable had the legislative history been silent regarding plans similar to the one at issue in *Newport News*. The dissent focused on the senate report that posed the hypothetical question which became the issue in *Newport News*. Whereas the majority suggested that the matter presumably had not been addressed in Congress because Newport News-type plans were uncommon, the dissent quoted from the legislative history: "It is certainly not this committee's desire to encourage the institution of such [Newport News-type] plans." *Id.* (Rehnquist, J., dissenting) (quoting S. REP. No. 331, 95th Cong., 1st Sess. 5-6 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 42, 43 (1979)). The dissent contended that the express desire not to encourage such plans cannot be construed as an intention to prohibit that kind of plan. 103 S. Ct. at 2635 (Rehnquist, J., dissenting).

Based on those factors, the dissent declared that the majority's analysis should have ended at that point, and thus defining reverse discrimination was unnecessary. *Id.* at 2636 (Rehnquist, J., dissenting). The dissent criticized the majority for adding judicial gloss to the meaning of discrimination when Congress had not defined the term in the PDA or Title VII context. *Id.* (Rehnquist, J., dissenting).

142. *Id.* at 2635-36 (Rehnquist, J., dissenting).

143. *Id.* at 2637 (Rehnquist, J., dissenting).

144. For the text of the PDA, see *supra* note 4.

145. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1974). The Plain Meaning Rule provides that the language in which the act is framed must be the first source of the statute's meaning. If the meaning is clear, courts must apply the statute according to its terms. The literal or obvious meaning of the statute, if in accordance with the intent, subject-matter and context of the entire statute, is conclusive. *Id.*; *see also* De Sloovere, *Textual Interpretation of Statutes,* 11 N.Y.U. L. REV. 538 (1933-34). The Golden Rule for literal interpretation of statutes is to adhere to the ordinary meaning and grammatical construction of the words, unless they are manifestly absurd or repugnant, or are at variance with the intention of the legislature. If such is the case, the meaning of the language may be varied or modified so as to avoid inconvenience, but no further. *Id.* at 546.

EEOC the authority it had previously enjoyed. The 1979 guidelines 21 and 22 thus represent a post-*Gilbert* rebirth of pre-*Aiello/Gilbert* policies.

Although the *Newport News* Court's definition of pregnancy-based discrimination as unlawful gender-based discrimination conformed with the broad congressional purpose underlying the PDA,[146] the Court's construction of the PDA appears to have transcended Congress' specific legislative intent. According to the Court, since employees, as well as their spouses, are considered financially responsible for their pregnancies, the scope of the PDA must be read to require that male employees receive the same pregnancy benefits as their female colleagues. The Court's conclusion is supported by the Senate Report which states that where pregnancy coverage is discriminatorily excluded from insurance plans, women are compelled to pay their own medical bills,[147] and therefore, are essentially being paid less than men for the same work.[148] Consistent with this reasoning, the *Newport News* Court employed the disparate treatment test of discrimination: whether similarly situated employees were treated comparably.[149] The Court correctly concluded that the male employees were victims of reverse discrimination.

The *Newport News* holding represents a progressive approach to the definition of discrimination. The Court did not view the employee and spouse as separate entities with separate burdens. Instead, it implicitly established the employee and spouse as a husband/wife unit[150] that copes as a team

146. For statements to the effect that pregnancy-based discrimination is discrimination on the basis of sex, see LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 168 (1979) (remarks of Rep. Sarasin, July 18, 1978); *id.* at 134 (remarks of Sen. Mathias, Sept. 16, 1977); *id.* at 73 (remarks of Sen. Bayh, Sept. 16, 1977); *id.* at 67 (remarks of Sen. Javits, Sept. 15 1977); *id.* at 24 (remarks of Rep. Hawkins, Apr. 5, 1977); *id.* at 18 (remarks of Sen. Bayh, Mar. 18, 1977); *see also Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 37, 51 (1977) (statement of Assistant Attorney General for Civil Rights, Drew S. Days); *id.* at 13 (statement of Sen. Bayh).

147. S. REP. No. 331, 95th Cong., 1st Sess. 5 (1977), *reprinted in* LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 42 (1979).

148. Note, *Employment Discrimination, supra* note 69, at 1040.

149. 103 S. Ct. 2622, 2631 (1983). By deeming pregnancy discrimination as prima facie sex discrimination, the Court eliminated the need for a disparate impact analysis in pregnancy discrimination cases. The "but for" test articulated in City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978), was a disparate treatment test and was adopted by the *Newport News* Court. 103 S. Ct. at 2631; *see also supra* note 127 and accompanying text.

150. The husband/wife unit or family unit analysis may be viewed as having two components: (1) If an employer's disability plan excludes or reduces coverage to the spouse for a sex-unique disability, there would be discrimination on the basis of sex. (2) The cost of the spouse's uncovered disability would financially burden the employee. That employee's family would suffer a monetary loss. The same sex-unique disability, when suffered by an employee, would not be a financial burden because the disability would be completely covered for the employee. That employee's family would not suffer a financial loss. The total benefit packages would have an unequal financial effect on the two employees' families. The packages would be unequal solely because the employees are of different sexes. Such an inequality would amount to discrimination on the basis of sex between employees and would be violative of Title VII.

The husband/wife unit analysis may be illustrated by a hypothetical situation that reverses the circumstances in *Newport News:* If the husband of a female employee is not covered to

with financial burdens, such as medical expenses. Consequently, an employer's decision regarding the provision of maternity benefits is not a choice for or against women, but one for or against childbearing family units. Thus, an employer's refusal to provide benefits to either spouse constitutes discrimination against both spouses and against the family unit.[151]

By including the concept of the husband/wife or family unit in Title VII analysis, the Court halted a type of tyranny perpetuated by the majority of employees against themselves. One commentator presaged the significance of a *Newport News* type situation by eight years, and articulated the concept as follows:

> [S]ince childbearing family units constitute the great majority of family units (past, present or prospective), any broad policy disfavoring such units is a decision not by a majority or a superior against a minority, but by a majority against themselves. It is appropriate to speak of broad policy here, since the pattern of priorities in fringe benefits here at stake has been set, not on a narrow plan-by-plan basis, but on a basis of almost universal union, employer, and governmental consensus. In short, the correct mental picture is not that of a biased employer deliberately discriminating against women, but rather that of an entire industrial society, dominated by present or prospective childbearing family units, deliberately discriminating against childbearing family units, by deciding that they would rather have a given fixed fringe benefit resource applied to disability from sickness and injury than to disability from pregnancy.[152]

The *Newport News* Court thus lessened the possibility of a majority in an industrial society imposing discriminatory medical benefit plans upon family units through collective bargaining agreements. It is reasonable to assume that female employees will not, absent coercion or pressure, bargain away their pregnancy insurance rights. Most women in the labor force are of childbearing age,[153] and therefore, would suffer economically if they voluntarily relinquished their pregnancy insurance rights. After *Newport News,* if disability coverage is provided for employees' spouses, then female spouses must receive pregnancy benefits equal to those received by female employees. Thus, if pregnancy rights are retained for female employees, they must be retained for all employees.

The *Newport News* rationale, if carried to its logical end, dictates that an employer who provides full medical benefits for its employees must also provide pregnancy benefits for its employees' spouses. It is important to

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the same extent as a male employee for a male-unique disability, such as prostate surgery, the female employee would receive a benefit package inferior to that received by a male employee, and her family would suffer a financial loss. The cost of the male employee's prostate surgery, however, would be covered and his family would not suffer a financial loss.

151. *See* Larson, *supra* note 69, at 819.

152. *Id.* at 819-20.

153. Eighty percent of American women become pregnant in their working years; 40% of all pregnant women are employed during their pregnancy; and almost 40% of mothers with children under six years of age are employed. 123 CONG. REC. 29,385 (1977) (remarks of Sen. Williams).

emphasize that although employers are not required to provide insurance benefits for their employees, the provision of such benefits is necessary for an employer to remain competitive in a modern industrial society.[154] In fact, disability insurance for employees and their dependents is now commonly viewed as an integral part of the employees' salary rather than a fringe benefit.[155] If an employer provides any disability insurance coverage to its employees, that coverage must include pregnancy coverage for female employees.[156] Accordingly, under the husband/wife unit analysis an employee's pregnant spouse must also be covered, even if the benefits plan does not expressly include coverage for dependents. According to the husband/wife unit analysis, the disability for the bearer of the child is simultaneously a disability for the father of the child—the male employee. In short, according to *Newport News,* a pregnancy in the family is a compensable disability for the employee, whether male or female. The spouse's pregnancy, therefore, must be compensated even in the absence of disability insurance for dependents.

This analysis essentially places pregnancy-related risks in a preferred classification, because pregnancy would be the only disability to carry an irrebuttable presumption of an inter-spousal effect for which the employee would always be compensated. It is questionable whether the *Newport News* Court intended to substitute one type of preference for another. If that was the Court's intention, then the discrimination against female spouses/male employees based on pregnancy benefits would be replaced by discrimination in favor of pregnancy over all other disabilities. If such substitution of preferential treatment is not what the Court intended, then to prevent preferred status for pregnancy, employers would be required to provide totally comprehensive coverage. An employer would bear a heavy burden in attempting to prove that an employee did not suffer financially from his or her spouse's medical disability. If this latter interpretation of *Newport News* is correct, then the Court has effectively eliminated all distinctions between spousal and employee disability coverage.

Newport News, however, is perhaps most significant for its effect on employers' insurance cost allocation. Although it is beyond the scope of this Note to analyze the solutions to the cost-allocation problems which would

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154. *See* Newport News Shipbldg. & Dry Dock Co. v. EEOC, 667 F.2d 448, 450 (4th Cir. 1982). The Court stated that employers have the same "employment-related purpose" when considering extension of medical benefits to employees' spouses as when they consider extension of these benefits to employees themselves. Employees would not extend such benefits if it did not serve an employment-related purpose. *Id.*

155. *See* H.R. REP. No. 6075, 95th Cong., 1st Sess. 15 (1977) (dissenting views of Rep. Weiss on anti-abortion language in the bill). Health benefits, like wages and other fringe benefits, are earned by the employee. They are not gifts from the employer to the employee. *Id.*

156. According to the Pregnancy Discrimination Act, *supra* note 4, if employees' disabilities are to be compensated, then pregnancy disability must be compensated. Pregnancy must be compensated to the same extent as a different disability that incapacitates to the same degree as pregnancy.

inevitably arise from requiring employers to provide total coverage, one of the controversies regarding these financial burdens can be identified. An obvious problem is that the cost of totally comprehensive coverage could exceed the benefit to the employer of using attractive disability benefits to recruit employees. Consequently, employers might eliminate these benefits.[157] Increased costs, however, could be defrayed by increasing employee contributions to the insurance programs. This method would only sustain the competitive aspect of offering insurance benefits if a substantial number of employers in a given industry could not afford comprehensive disability insurance for employees and their spouses. Such a method is similar to that utilized by nations with socialized medical plans which are funded by high taxes.[158]

Another alternative for the employer, rapidly becoming popular in the United States, would be to insure employees through a health maintenance organization.[159] Such a system would require an employer to pay a relatively small insurance premium of equal size for each employee. Under this system, the employee would make equal payments, also in advance, and receive comprehensive family coverage.

A less attractive, but nevertheless viable, alternative would be to pass along the increased expense of the employer's product or services to the general public. The consumer, however, might object to higher costs for goods and

157. Consequently, when employer and employees, or their representatives, sit down at the bargaining table, the provision of disability benefits is frequently an all-or-nothing proposition. *But see* H.R. 6075, 95th Cong., 1st Sess. 6 (1977) (employer cannot discontinue existing insurance plans until at least one year after enactment).

158. Many European countries' governments have assumed the economic responsibilities of pregnancy and childbirth. *See* K. DAVIDSON, R. GINSBURG & H. KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 504 (1974). Virtually all European countries have some form of national health insurance system for employees, their spouses and dependents. Generally these cover all medical expenses for childbirth and include at least a part of pre- and post-natal medical expenses. For a discussion of governmentally-controlled health services in European nations, see NATIONAL HEALTH SERVICES, THEIR IMPACT ON MEDICAL EDUCATION AND THEIR ROLE IN PREVENTION (J. Bowers & E. Purcell ed. 1973) (countries discussed: Great Britian, France, Spain, Denmark, Sweden, Norway, Yugoslavia, Israel, India, Peoples Republic of China, Japan, New Zealand, and the United States).

159. A health maintenance organization (HMO) is an organization responsible for the provision of comprehensive health services to enrolled persons in return for an established monthly premium. F. WILSON & D. NEUHAUSER, HEALTH SERVICES IN THE UNITED STATES 112 (2d ed. 1982). The concept of prepaid group health care has existed for almost a century, but the term "health maintenance organization" dates to the early 1970's. During the Nixon administration the federal government supported and encouraged development of HMOs as an alternative to traditional health care. Today, HMOs are probably the most rapidly expanding health care system in the country. R. NUMEROF, THE PRACTICE OF MANAGEMENT FOR HEALTH CARE PROFESSIONALS 79 (1982).

The Health Maintenance Organization Act of 1973 defined the HMO as an organized system of health care that either provides or arranges the provision of a comprehensive range of basic and supplemental health care services to its enrollees on a prepaid basis. *Id.* Health Maintenance Organization Act of 1973, Pub. L. No. 93-222, 87 Stat. 914 (1973) (amended 1976, 1978, 1981). For a discussion of the provisions of these amendments, see F. WILSON & D. NEUHAUSER, *supra*, at 208-11.

services to support and encourage reproduction and to pay for other disabilities incurred by employees and their dependents. Yet, such an objection would be unfounded because a distinction should not be drawn between family-oriented medical costs and other labor-related costs, which also ultimately drive up the price consumers must pay for goods and services.[160]

CONCLUSION

The Supreme Court's decision in *Newport News* has far-reaching consequences. Primarily, by returning to the spirit of Title VII that flourished prior to *Gilbert,* the Court endeavored to protect women, victims of traditional societal discrimination, from further discrimination perpetrated against their husbands. Every pregnancy involves a man as well as a woman. Where maternity benefits are granted, the father receives a direct economic benefit; where they are withheld, he bears a direct financial burden.[161] In most situations, *Newport News* will prevent "pregnant families" from becoming victims of sex discrimination.

Harriet Beth Robbins-Ost

160. *See* Ginsburg, *Gender and the Constitution,* 44 U. CIN. L. REV. 1, 40 (1975). "We will continue to shortchange parents, particularly mothers, and children until childrearing burdens are distributed more evenly among parents, their employers and the tax-paying public." *Id.*

161. Larson, *supra* note 69, at 819.